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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1017

RAYMOND ALFRED BEAUDINE,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

RAYMOND ALFRED BEAUDINE,
Petitioner

v

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, RAYMOND ALFRED BEAUDINE, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this cause on August 14, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals to be reviewed is reported at 414 F2d 397 and is printed in the appendix hereto. The case was before the Court of Appeals on an earlier appeal and that opinion was reported at 368 F2d 417 and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1969. A timely, petition for rehearing was denied on November 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair trial because all statements he was entitled to receive from the Government under the Jencks Act, Title 18, U.S.C. 3500, were furnished to his counsel in the presence of the jury and this, in spite of a request that the jury be absent when they were supplied to him.

2. Whether Petitioner was denied a fair trial when the Government denied him effective cross-examination of the Government's main witness by the Government's failure to produce, at the appropriate time, requested evidence which was material to the impeachment of the witness.

3. Whether the Petitioner was denied a fair trial when he was denied the opportunity to testify directly as to his intent as charged in the Indictment.

4. Whether the Petitioner was fully informed of the nature and cause of the accusation against him by the Indictment, which charged him with intent to injure and defraud the Federal Savings and Loan Insurance Corporation and Clearwater Federal Savings and Loan Association in violation of Title 18, U.S.C. 1006, but which allowed a conviction based upon evidence which showed merely a conflict of interest and which did not prove a loss to the Association or the Government, or a purpose to bring about a loss to the Association or the Government.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . ."

The Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . ."

Section 3500, Title 18, United States Code, provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

Section 1006, Title 18, United States Code, provides in pertinent part:

> "Whoever, being an officer, agent, or employee of or connected in any capacity with . . . any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States . . . with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation . . . shall be fined . . . or imprisoned . . ., or both."

STATEMENT OF THE CASE

The Indictment, which was returned in 1963, contained three of five counts charging Petitioner. Counts One and Three charged that Petitioner, with intent to injure and defraud Clearwater Federal Savings and Loan Association and the Federal Savings and Loan Insurance Corporation, shared in and received benefits from one Joseph Mulvey through transactions and loans of the Association. Counts Two and Four charged Mulvey with aiding and abetting Petitioner to commit the offenses charged against Petitioner in Counts One and Three. Count Five charged Petitioner and Mulvey with conspiracy. The Petitioner was tried alone on Counts One, Three and Five. At the first trial, a jury returned a verdict of guilty, which was reversed by the Fifth Circuit Court of Appeals. *Beaudine v. United States,* 5 Cir., 1966, 368 F2d 417. On remand and retrial, Petitioner was found guilty of Count Three only and was sentenced to five years imprisonment. The Court of Appeals affirmed the conviction, *Beaudine v. United States,* 5 Cir., 1969, 414 F2d 397.

The record before the Court of Appeals on the two occasions the case was before that Court, was substantially the same and the evidence, accepted in the light most favorable to the Government, is set forth in the two cited opinions of the Court of Appeals. Briefly summarized it shows that in May of 1959, Petitioner was employed by the Clearwater Federal Savings and Loan Association to manage its home improvements loan department with the title Home Improvement Loan Officer. He was to develop home improvement loans. He established the department, and received and considered applications and closed loans with full authority to approve or disapprove home improvement loans. His employer did not set forth any rules or regulations guiding him in his duties. The FHA regulations on home

improvement loans were broad, and under them the Association and its loan officers could rely upon the statements contained in a customer's application for a home improvement loan. Petitioner instituted a policy of obtaining a credit report on each applicant and required the applicant to agree not to encumber the property.

The heart of the Government's case was that Mulvey and Beaudine entered into an agreement as the result of which Beaudine, as an officer of the Federal Savings and Loan Association, participated in receiving money from Mulvey through loans at the Clearwater Federal Savings and Loan Association. Mulvey testified that Petitioner had asked him if he would like to have a partner, with Petitioner receiving half the profit Mulvey made on home improvement loans. Mulvey testified that between July and September of 1960 he paid Beaudine between sixteen and eighteen thousand dollars as his portion of the profits on jobs that his construction company had financed through Petitioner at Clearwater Federal Savings and Loan Association.

The Government did not prove, nor even undertake to prove, that the Association or the Government suffered any loss or likely would suffer a loss from any of the Beaudine-Mulvey transactions.

At the very outset of the trial, after the Government's first witness had testified on direct examination, counsel for Petitioner requested "any 3500 statements". The trial judge then instructed the jury as follows:

> "The best thing to do -- and we won't have this happen again because the Government will produce the statements, Lady and Gentlemen of the Jury, that they have in their possession, if any

there is, taken from witnesses who are going to testify on behalf of the Government, because under the law the attorney for the defendant has a right to examine those statements before he begins his cross-examination of the witness, so Mr. Ragano has a right to examine this five-page statement that this witness apparently has given to the Government before he starts on his cross-examination, but we are going to avoid that difficulty from now on out because the Government is going to furnish them the statement as the witness comes to the witness stand, see, but we'll take a recess for 10 minutes, at least 10 minutes or until you are sooner advised." (Tr-61)

Counsel for Petitioner, in the absence of the jury, requested that all further statements under the Jencks Act be furnished to the defense in the absence of the jury (Tr-62). The request and objection was overruled (Tr-70), although defense counsel was not required to request such statements in the presence of the jury. Throughout the remainder of the trial, Jencks Act statements were physically handed to defense counsel for each witness in full view of the jury.

Joseph Mulvey testified on direct examination that he had been convicted of a felony four times - - in 1934, 1936, 1948 and 1960. These offenses included breaking and entering, theft of an automobile, and defrauding the Government in connection with FHA loans. On cross-examination Mulvey was asked whether it was not a fact that he had been convicted not of four, but of seven different felonies. He denied the suggestion. At Petitioner's request, there was then a sidebar conference at which Petitioner's attorney stated that he believed Mulvey had been convicted of seven different felonies and asked the Court to order Government counsel to

produce a rap sheet or F.B.I. record to impeach the witness. This motion was denied, the trial court in effect saying that it was up to Petitioner to try to prove that the witness had been convicted of three other felonies. Subsequently, a subpoena duces tecum was served on a special agent of the F.B.I. who had been with Government attorneys throughout the trial at counsel table. After a hearing the Court then ordered the Government to produce the rap sheet for the Court's inspection in camera and then ordered the Government to turn it over to counsel for Petitioner. Mulvey was subsequently cross-examined by counsel for the Petitioner with the rap sheet in counsel's possession. On this cross-examination Petitioner's counsel elicited from Mulvey, testimony that indicated that he had been convicted of serious crimes more frequently than he had admitted when he was on direct examination.

The Petitioner testified in his own behalf and was asked the following question on direct examination:

> "Have you ever during your association with the Clearwater Federal Savings & Loan Association done any act with the intent to injure and defraud that Association?"

The government objected to the form of the question, and contended that its terminology was in words of legal art. The objection was sustained by the trial court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeal as to the Proper Procedure by which Jencks Act Statements are to be Furnished to Defense Counsel.

The Court of Appeals recognized that Petitioner's objection concerning the manner in which the defense was required to obtain Jencks Act statements in the trial, presented a serious problem for consideration. It is undisputed that such statements were furnished to Petitioner's counsel in the presence of the jury for each witness, including Mulvey, in spite of a request that the jury be absent at the time when they were to be supplied.

It is undisputed that the trial court, at the very outset of the trial, informed the jury that the Government was producing such statements to defense counsel so that counsel could examine the statements for the purpose of cross-examination.

The Court of Appeals further recognized that there was substance to Petitioner's contention that such procedure did elevate the prior statements to the status of corroboration of the witness' testimony by a previous consistent statement. Finally, the Court of Appeals recognized that decisions from other Districts supported this contention. The District of Columbia Circuit in *Gregory v. United States,* 125 U. S. App. D.C. 140, 369 F2d 185 (1966), declared it to be reversible error to require that requests and examination of such statements be made in the presence of the jury. The Seventh Circuit in *United States v. Stahl,* 7 Cir., 1968, 393 F2d 101, 105, cited the *Gregory* decision as well as *People v. Lowe,* 84 Ill. App. 2d 435, 228 N.E. 2d 563, where the

"unfairness" of such procedure was recognized as "plain error". The Seventh Circuit failed to reverse on this ground because no objection was made, and the statements were used in cross-examination, thus the reasons advanced by the District of Columbia Court of Appeals were not applicable to the *Stahl* case. In Petitioner's trial, however, objections were lodged and *none* of the statements were used in cross-examination.

The Second Circuit Court of Appeals suggests a procedure in *United States v. Gardin*, 2 Cir., 1967, 382 F2d 601, 605, whereby after direct examination of a witness the Defendant will state that he requests leave to make a motion in the absence of the jury. The trial judge is then to excuse the jury; and in its absence, the Defendant will move for disclosure of Jencks Act material.

The Fifth Circuit Court of Appeals, in this case, has adopted the holding of the First Circuit Court of Appeals in the case of *Pallotta v. United States*, 1 Cir., 1968, 404 F2d 1035. The rule adopted sets forth that where a witness' testimony is *especially crucial* in the context of a given trial, those Jencks Act statements should be *produced and studied in the physical absence of the jury*. This portion of the rule was not followed in the trial below. That Mulvey was such a witness was clearly established in the first appeal in this cause when the Court of Appeals found that, "the whole case, both from the standpoint of its legal sufficiency and from the probative persuasiveness for jury resolution, rested on Mulvey". *Beaudine v. United States*, 5 Cir. 1966, 368 F2d 417, 420. Mulvey was, "the key witness upon which the Government's whole case rested, both legally and persuasively". *Beaudine v. United States*, supra, p. 424.

The appropriate procedure outlined by the Fifth Circuit and by the First Circuit in *Pallotta v. United States,* supra, was *not* followed with the witness Mulvey, but on the contrary, Mulvey's Jencks Act statement was produced in the physical presence of the jury and Petitioner and his counsel were required to study this statement in the physical presence of the jury. This was required even though Petitioner had requested that all statements be produced, and an opportunity be afforded to study such statements, in the absence of the jury.

The *Pallotta* decision suggested that in other instances it would be sufficient to produce the statements out of the hearing of the jury (where such witnesses were not crucial). Even this method of production of Jencks Act statements was not followed in the trial of this cause because the trial court had fully informed the jury that such statements of all witnesses would be furnished to defense counsel and then compelled defense counsel to receive such statements in *full view* of the jury, each and every time a Government witness, including Mulvey, completed his direct examination. Thus, neither of the suggested modes of procedure adopted in this decision was followed in the trial below.

Prejudice flowed from the procedure followed by the trial court because the Jencks Act statements were *not* used to cross-examine Mulvey or any other Government witness. The Seventh Circuit was unable to perceive any prejudice to the Defendant in *United States v. Nielsen,* 7th Cir. 1968, 392 F2d 849, 854, "inasmuch as his counsel conducted a vigorous cross-examination after receiving the Jencks Act Statements". The First Circuit in *Pallotta v. United States,* stressed that a jury may infer that a Jencks Act statement was consistent with the testimony of a witness if defense counsel decides not to use the statement in cross-examining a witness after receiving and examining a statement be-

fore the eyes of the jury (see p. 1037 of that decision). We submit that the Fifth Circuit overlooked that the jury could have reached, or did reach, such a conclusion with each witness, including Mulvey, in the trial of Ray Beaudine in the trial below. This did result, we submit, in the Government indirectly accomplishing the corroboration of each of its witnesses by prior statements — all over the objection of Beaudine.

The rule adopted by the Fifth Circuit states that, "If the statements are used in cross-examination, the jury should be informed of the source of the questions and the statutory authority governing the use of such statements" (p. 403). In Beaudine's trial, the jury was so informed even though the statements were *not* used in cross-examination.

It appears to Petitioner that there is a conflict between the various circuits on the same matter of federal law. In view of the fact that one of the prime purposes of the certiorari jurisdiction in this Court is to bring about uniformity of decisions among the federal courts of appeals; in view of the increasing occasions when this question is arising; in view of the failure of Section 3500, Title 18, United States Code, to specify the proper procedure; and in view of the prejudice to the Petitioner inherent in the procedure followed in the trial below, Petitioner submits that the writ should be granted and the proper procedure should be resolved by this Court.

2. The Decision Below Approved of the Government's Failure to Produce Requested Evidence at the Appropriate Time which was Material to the Cross-Examination and Impeachment of the Government's Main Witness.

The very crux of the reversal by the Court of Appeals of the first conviction of the Petitioner was the deprivation of the right to full cross-examination of Joseph Mulvey. *Beaudine v. United States*, 368 F2d 417 (1966). The Government, therefore, should have been exceptionally alert to provide that full cross-examination of Mulvey on the re-trial of the case. Such cross-examination of Mulvey was not provided, Petitioner submits. Although the prosecution had, in their possession, the record of convictions of Mulvey, the prosecution allowed Mulvey's testimony on direct examination that he had been convicted of four felonies to stand uncorrected. The prosecution then *objected* to Petitioner's request for the production of the record of Mulvey's convictions (which reflected more than the four testified to by Mulvey), and *challenged* the defense to prove there were more than four. Mulvey left the stand and it was a substantial period of time later, and after other witnesses had testified, that Mulvey was required to resume the stand to be further cross-examined by Petitioner's counsel, who by then had been furnished such records by subsequent order of the Court. Such bifurcated cross-examination deprived Petitioner of his right to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and of his right to be confronted with the witness against him for the purpose of cross-examination, guaranteed by the Sixth Amendment to the Constitution of the United States.

The Fifth Circuit Court of Appeals, in the case of *Williams v. Dutton,* 1968, 400 F2d 797, 800, has stated that an affirmative duty is imposed upon the prosecution to produce, *at the appropriate time,* requested evidence which is materially favorable to the accused as impeaching evidence. There is no question but what

the number and times of conviction of Mulvey was that type of evidence. The appropriate time to produce this evidence was at least prior to the commencement of cross-examination and at the close of Mulvey's direct testimony. As stated by Professor Wigmore, the advantages secured by cross-examination are in many instances mainly dramatic but nonetheless important. To gain such advantage of cross-examination it should *immediately succeed* in time the direct examination.

> "In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses, to diminish or conceal their force. Proving the same facts by new witnesses, after others of the proponent have intervened, might lose this benefit, and the counsel's argument at the close might not be able to replace it.
>
> (b) But, chiefly, the advantage is that the cross-examined witness *supplies his own refutation.* If qualifying or discrediting answers are extracted from him, they are the more readily believed. No other witness' credit intervenes to add a contingency of mistake. If we believed the answers on the direct examination, we must also believe the answers on cross-examination. Moreover, the dramatic contrast of the former and the latter may multiply and even exaggerate the concrete probative effect of the facts extracted." 5 Wigmore, Evidence, Sec. 1368 (3d ed. 1940).

Mulvey was allowed to leave the witness stand after a portion of the cross-examination, and before resuming the stand, apparently conferred with an agent of the Government concerning the content of the questions that would be directed to him prior to the resumption of the cross-examination. This procedure effectively denied Petitioner of a right which has long been deemed "so essential for the due protection of life and liberty

that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most, if not all, the states composing the Union". *Pointer v. State of Texas,* 85 S. Ct. 1065, 13 L.ed 2d 923 (1965).

3. The Refusal to Permit the Petitioner to Testify Directly as to His Intent as Charged in the Indictment is Reversible Error Where the Conviction Rests Largely upon the Testimony of a Felon and Self-Confessed Accomplice.

Beaudine was asked the following question by his counsel:

> "Have you ever during your association with the Clearwater Federal Savings & Loan Association done any act with the intent to injure and defraud that Association?"

The government objected to the form of the question, and contended that its terminology was in words of the legal art.

The objection was sustained and Petitioner contends that this action prevented him from testifying directly concerning his intent in answer to the language of the charge contained in the Indictment. *Crawford v. United States,* 29 S. Ct. 260, 53 L.ed 465, 212 U.S. 183; *Miller v. United States,* 10 Cir. 1941, 120 F2d 968, 970; *Krogmann v. United States,* 6 Cir. 1955, 225 F2d 220, 229.

4. The Indictment, Which Charged Petitioner with Intent to Injure and Defraud, Did Not Sufficiently Advise Him that no Proof Need be Adduced by the Government of a Loss to the Association or the Government or that the Association or the Government Likely

Would Suffer a Loss From Petitioner's Actions or Intent in Order to Convict Petitioner Under the Indictment and Section 1006, Title 18, U.S.C.

Count Three of the Indictment, which is the Count under which Petitioner stands convicted, charged that:

> "RAYMOND ALFRED BEAUDINE, an officer of the Clearwater Federal Savings & Loan Association, did participate and share in and receive directly and indirectly money, profits, property and benefits, to-wit, moneys in excess of the sum of $2,500.00 from Joseph M. Mulvey, through transactions and loans of the said Clearwater Federal Savings & Loan Association, with intent to injure and defraud the Federal Savings & Loan Insurance Corporation and Clearwater Federal Savings & Loan Association; in violation of Title 18, United States Code, Section 1006." (Tr-848)

It had been previously held by the Federal Courts that an intent to defraud a bank under circumstances such as these is such that, if the intent is carried into execution, it will necessarily or naturally injure or defraud the bank. *Cravens v. United States,* 8 Cir., 1932, 62 F2d 261, 277. The Grand Jury which returned the Indictment apparently required such proof because of the inclusion of the word "injure" in conjunction with "defraud" when charging the applicable intent of the Petitioner. The word "injure" is not necessarily the same as "defraud." "Injure" is used in designating an injury, which has a common and well understood meaning of hurt or damage. See *United States v. Lee,* Cir. Ct. N.D.N.Y. 1882, 12 F 816, 819. The Court of Appeals held in the first appeal of this case, that even though the record was inadequate to prove that a loss to the Association, or the Government, would naturally result

from Petitioner's alleged intent, a conviction could still be obtained by proof of a typical conflict of interest situation. 368 F2d at 420.

The Indictment, as subsequently construed by the Court of Appeals in this case (which confirmed the decision in the earlier case on this point as the law of this case), failed to apprise the Defendant with reasonable certainty of the nature of the accusation against him. It, therefore, was defective, it violated the Sixth Amendment to the United States Constitution and a reversal of the conviction is required. *Russell v. United States,* 369 U.S. 749, 8 L.ed 2d 240, 82 S. Ct. 1038.

The Defendant expected the Government to be required to prove an intent to "injure". Yet, a conviction was sustained without any proof being adduced of such an intent. As in *Russell,* the Indictment failed to inform Petitioner of the accusation against him, but instead left the prosecution to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

CONCLUSION

For all of the reasons advanced, and in the interest of justice, the Petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25019

RAYMOND ALFRED BEAUDINE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(August 14, 1969)

Before GOLDBERG, GODBOLD and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: This case is before us for the second time. Appellant was originally indicted in 1963, when a five-count indictment charged him, as an officer of Clearwater Federal Savings and Loan Association, and Joseph Merrill Mulvey with violating Title 18, U.S.C., §1006 and Title 18, U.S.C., §371 in that appellant took kickbacks from Mulvey, a contractor performing work for borrowers under Title I,

Home Improvement Loan, and conspired to commit offenses against the United States. Counts One and Three of the indictment charged that appellant, with intent to injure and defraud Clearwater Federal Savings and Loan Association and the Federal Savings and Loan Insurance Corporation, shared in and received benefits from Mulvey through transactions of loans of the association. Counts Two and Four charged Mulvey with aiding and abetting appellant to commit the offenses charged against him in Counts One and Three. The fifth count of the indictment charged appellant and Mulvey with conspiracy. At the first trial of this case in 1963 the counts against Mulvey were dismissed on the basis of double jeopardy. A jury then returned a verdict of guilty against Beaudine as to the three remaining counts of the indictment, and he was sentenced to five years' imprisonment on each of these counts, the sentences to run concurrently. On appeal from that conviction this Court reversed on the ground that restrictive cross-examination of Mulvey, along with other restrictive evidentiary rulings, could not be regarded as harmless error. *Beaudine v. United States*, 5 Cir. 1966, 368 F.2d 417. On remand and retrial, appellant was acquitted by a jury as to Count one and Count Five, but was found guilty as to Count Three, and was sentenced to five years' imprisonment. The present appeal followed.

As this Court said on the previous appeal in this case, Title 18, U.S.C., §1006, "makes it an offense for an officer, agent, or employee of a savings and loan association to participate or share in or receive directly or indirectly any money profit, property, or

benefits through any transaction, loan, commission, contract, or any other act of such association if done 'with intent to defraud the United States or any agency thereof.' " *United States v. Beaudine,* 5 Cir. 1966, 368 F.2d 417, 419. On this appeal Beaudine contends that the mental element of the crime was not proven by sufficient evidence and that various rulings of the trial court concerning testimony and other evidence denied him a fair trial. We find these contentions to be without substance and affirm.

The factual background culminating in this indictment may, as was said in the earlier case, 368 F.2d at 419, "be quickly told". In May of 1959 appellant was employed by the Clearwater Federal Savings and Loan Association to manage its home improvements loan department with the title Home Improvement Loan Officer. He was to develop home improvement loans. He established the department, and received and considered applications and closed loans with full authority to approve or disapprove home improvement loans. His employer did not set forth any rules or regulations guiding him in his duties. The FHA regulations on home improvement loans were broad, and under them the association and its loan officers could rely upon the statements contained in a customer's application for a home improvement loan. Appellant instituted a policy of obtaining a credit report on each applicant, and required the applicant to agree not to encumber the property.

The heart of the government's case was that Mulvey and Beaudine entered into an agreement as the result

of which Beaudine, as an officer of the federal savings and loan association, participated in receiving money from Mulvey through loans at the Clearwater Federal Savings and Loan Association. Mulvey testified that appellant had asked him if he would like to have a partner, with appellant receiving half of the profit Mulvey made on home improvement loans. Mulvey testified that between July and September of 1960 he paid Beaudine between sixteen and eighteen thousand dollars as his portion of profits on jobs that his construction company had financed through appellant at Clearwater Federal Savings and Loan Association.

Appellant's first argument is that there was insufficient evidence of the "intent to defraud" required by the statute. Appellant says, as he did on the prior appeal. "The testimony (accepting the truthfulness for the purposes of argument) of Mulvey, showed an agreement whereby Mulvey and the appellant would divide the profits that Mulvey would make on home improvement work that Mulvey's company would undertake on loans secured through Clearwater Federal Savings and Loan Association". Appellant argues, however, that the agreement not only did not show any intent to injure or defraud Clearwater Federal Savings and Loan Association, but on the contrary showed that appellant would give Mulvey a few jobs if Mulvey would straighten out the credit or get them in such a position that the loan would be all right.

This Court in *Beaudine v. United States*, 368 F.2d at 420, carefully examined and analyzed the statute under which Beaudine was convicted. It was pointed

out that the statute embraces a typical conflict of interests prohibition, and that when there is a purpose to deceive by one who ostensibly acts solely for his principal while he knows he has a pecuniary interest that will or may subvert his undivided loyalty, the fraudulent purpose is completed whether the objective is to obtain an advantage or to cause the principal to suffer a loss. The evidence amply supports the jury verdict on Count There. Indeed, appellant concedes that the record is in substantially the same position as on the first appeal and that the point as to his intent is controlled by this Court's decision in the earlier case. That decision was reached after a careful review of the statutory requirements. It is the law of this case, and no "cogent reason" — either a change in controlling law or any other — is suggested for departure from it.[1]

The chief contentions of appellant relate to the conduct of the trial, and he raises four points in regard to which he claims the trial court erred so as to deny him a fair trial. It is urged that the trial court erred (1) in the denial of an opportunity to testify as to his intent when he accepted money from Mulvey, (2) in the allowance into evidence of transactions outside the scope of the indictment, (3) in the government's failure to produce upon request records that would have aided appellant in the cross-examination of Mulvey,

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[1] *Lumbermens Mutual Casualty Co. v. Wright*, 5 Cir. 1963, 322 F.2d 759 at 763; cert. denied 354 U.S. 939, 77 S.Ct. 1397, 1 L.Ed.2d 1536; *Lincoln National Life Insurance Co. v. Roosth*, 5 Cir. 1962, 306 F.2d 110; *Green v. American Tobacco Co.*, 5 Cir. 1968, 391 F.2d 97 (dissenting opinion at page 106, 113, adopted as Court's opinion en banc, 5 Cir. 1969, 409 F.2d 1166)

and (4) in the manner in which Jencks Act statements were furnished to him. These contentions will be considered in order.

Beaudine was asked the following question by his counsel:

> "Have you ever during your association with the Clearwater Federal Savings & Loan Association done any act with the intent to injure and defraud that Association?"

The government objected to the form of the question, and contended that its terminology was in words of legal art The objection was sustained by the trial court, and appellant contends that this action amounted to a deprivation of his right to testify as to his intent in accepting money from Mulvey. This contention is without merit. The question was extremely broad in form, and appellant did not seek to rephrase it. The mental element of this crime was specifically described on the former appeal, where this Court pointed out that if there was a purpose to deceive, it did not matter whether the objective was to obtain an advantage or to cause the principal to suffer a loss — either objective completed the fraudulent purpose. 368 F.2d at 420. Appellant had full opportunity to testify as to his mental state. In response to questions put by his counsel, he testified that he had never approved any loan applications for Clearwater Federal Savings & Loan Association that he felt were harmful to the association or improper in any fashion. He testified that he had never been in partnership with Mulvey,

directly or indirectly, that he had never received any kickbacks from Mulvey directly or indirectly, and that he had never offered to make an illegal or bad loan to anyone. The jury was fully and properly instructed as to the mental element of this crime, and appellant was not denied his right to testify as to his intent.

Appellant next urges that the trial court erred in permitting witnesses to testify as to transactions not specified in the indictment itself. This contention is lacking in substance. On the previous appeal Judge Brown pointed out that "Broad range was rightfully allowed to the government in establishing the general scheme, pattern, procedure, motivation and practice out of which to establish the requisite intent to defraud and participation in profits". 368 F.2d at 425. The trial judge had in mind and specifically referred to the language in the prior opinion dealing with the proof of intent, and ruled in accordance with that holding in admitting the complained of testimony. Further, it should be kept in mind that Count Five, the conspiracy count was before the jury, although the jury later found Beaudine not guilty under that count. The other transactions were properly for the jury's consideration as circumstances probative of conspiracy. No error is made to appear in this regard.

It is further contended by Beaudine that he was denied a fair trial because the government was not ordered to produce a "rap sheet" or an F.B.I. record for appellant's use in cross-examining the witness Mulvey. Of course Mulvey was the crucial witness against Beaudine, and it was therefore highly important that

the appellant have full opportunity to discredit him if possible. This was the crux of our reversal upon the former appeal.

An examination of the entire testimony and the transactions concerning Mulvey's prior record make it clear, however, that appellant was not denied a fair trial in this respect. On direct examination Mulvey testified that he had been convicted of a felony four times — in 1934, 1936, 1948 and 1960. These offenses included breaking and entering, theft of an automobile, and defrauding the government in connection with FHA loans. On cross-examination Mulvey was asked whether it was not a fact that he had been convicted not of four, but of seven different felonies. He denied the suggestion. At appellant's request there was then a sidebar conference at which appellant's attorney stated that he believed Mulvey had been convicted of seven different felonies and asked the court to order government counsel to produce a rap sheet or F.B.I. record to impeach the witness. This motion was denied, the trial court in effect saying that it was up to appellant to try to prove that the witness had been convicted of three other felonies. Subsequently, a subpoena duces tecum was served on a special agent of the F.B.I. who had been with government attorneys throughout the trial at counsel table. After a hearing the court then ordered the government to produce the rap sheet for the court's inspection in camera and then ordered the government to turn it over to counsel for appellant. Mulvey was subsequently cross-examined by counsel for the appellant with the rap sheet in counsel's possession. On this cross-examination appellant's counsel elicited from Mulvey testimony that indicated that

he had been convicted of serious crimes more frequently than he had admitted when he was on direct examination. Some of this testimony could be construed, however, to show that Mulvey on direct examination was not necessarily lying deliberately, but may have been confused as to a distinction between a misdemeanor and a felony, concurrent sentences, and crimes committed while he was incarcerated. The testimony in its entirety shows clearly that appellant had and took advantage of a full opportunity to present to the jury the character, background and veracity of the witness Mulvey. Although appellant received some of the information that enabled him to cross-examine more vigorously at a later time than he would have preferred, his cross-examination was complete before the government rested its case. This point obviously is devoid of merit.

Appellant's final contention presents the most serious problem for our consideration. He urges that he was denied a fair trial because statements he was entitled to receive from the government under the Jencks Act, Title 18, U.S.C., §3500, were furnished to his counsel in the presence of the jury, and this in spite of a request that the jury be absent when they were supplied to him. The procedure followed by the trial court was to have the government furnish appellant's counsel with a witness' prior statements when the witness came to the stand, and to call a recess for the purpose of allowing appellant's counsel to examine the statement before beginning his cross-examination of that witness. The trial court carefully informed the jury that this procedure would be followed. Appellant's contention

is that he was thereby placed in an untenable position in the eyes of the jury, in that a subsequent failure on his part to cross-examine or to offer evidence revealed by the statement would in the mind of the jury elevate the prior statements to the status of corroboration of the witness' testimony by a previous consistent statement.

There is substance in this contention, and support for it in some decisions. In *Gregory v. United States*, D.C. Cir. 1966, 369 F.2d 185, the Court of Appeals for the District of Columbia found it was improper for the trial court to require defense counsel to request, receive, and read Jencks Act statements in the presence of the jury. The Court there relied upon its earlier decision in *Johnson v. United States*, D.C. Cir. 1965, 347 F.2d 803, where the Court referred to the well-known rule of evidence that prior consistent statements may not be used to support one's own unimpeached witness. It was pointed out in the *Johnson* case that the Jencks Act did not abrogate this time-honored common law evidence rule. It was said that in order to avoid undue prejudice which might arise if the jury knew that Jencks Act statements were available to the accused, motions for their production should be made out of the hearing of the jury and the handing over of the statements should take place with the jury absent or at least unaware. In that case the statements were turned over to defense counsel in the presence of the jury and then a recess was called to permit counsel to study the statements. That seems to have been the practice followed in the trial below. In *Gregory* the trial judge had shown familiarity with the

Johnson case but declined to follow the procedure suggested by it because he thought the statements there were dictum. On appeal, the Court in *Gregory* said that its purpose in *Johnson* had been to preclude the jury "from drawing an inference that the statement or statements received are consistent with the witness' testimony unless defense counsel uses the statements to cross-examine him". The Court there said it could not perceive any reason other than to prejudice the exercise of Jencks Act rights to require defense counsel to request and receive such statements in the presence of the jury.

Permitting the jury to be present when Jencks Act material was being marked for identification was indirectly criticized in *United States v. Kahn,* 2 Cir. 1966, 366 F.2d 259, 265, cert. den. 385 U.S. 948, rehearing den. 385 U.S. 984, where the Court pointed out that it would have perhaps been better if the identification had been done in the absence of the jury. The Court said that the procedure followed there was not by itself sufficient grounds for reversal.

The suggestion in the *Kahn* case was supplemented by the Court of Appeals for the Second Circuit in *United States v. Gardin,* 2 Cir. 1967, 382 F.2d 601, 605, where the Court said:

> "The procedure to be followed should be left to the discretion of the trial judge. While we therefore lay down no hard and fast rule, we do suggest the following which generally may meet the positions of both parties. After the

> completion of the witness' direct testimony and before cross-examination has been concluded, the defendant will state that he requests leave to make a motion in the absence of the jury; the trial judge will then excuse the jury, and, in its absence, the defendant will move for disclosure of Jencks Act material."

Judge Moore concurred specially in the *Gardin* case because he thought the suggestion made by the majority of the Court there was for all practical purposes a direction, and he felt that a greater amount of discretion should be left to the trial judge in light of the circumstances that arose at a trial.

The rule of *Gregory* established for the District of Columbia and the rule of *Gardin* for the Second Circuit were recently appraised by the Seventh Circuit in *United States v. Nielsen*, 7 Cir. 1968, 392 F.2d 849, 853, 854. The Seventh Circuit in the *Nielsen* case felt itself incapable of envisioning every situation that might arise concerning the production of Jencks Act statements, and therefore declined to establish an inflexible rule leaving it instead to the sound discretion of the trial judge. In that case, for example, the Court affirmed a conviction because it found no prejudice resulting in view of defendant's counsel's vigorous cross-examination after he had received the Jencks Act statements. Defense counsel had requested to be heard out of the presence of the jury and had objected to the manner of tendering the statements. In *United States v. Stahl*, 7 Cir. 1968, 393 F.2d 101, 105, the Court quoted with apparent approval from *Gregory v. United*

States, and referred to the procedure as unfair. The Court also said that the trial court's comment that the Jencks Act statement was being furnished to see if the witness was telling the same story on the stand as she told the F.B.I. when they took her statement, may serve to compound the error. In that case, however, no objection was made, the statements were used in cross-examination, and the incident was found to afford no basis for reversal.

Pallotta v. United States, 1 Cir. 1968, 404 F.2d 1035, is a recent and well-reasoned opinion which considers and evaluates the positions adopted by different Circuits and shows that prejudice may result both to the defense and to the prosecution in the implementation of the right of examination of pre-trial statements of government witnesses. We quote with approval and adopt for this Circuit the holding of that case. In our judgment it gives appropriate consideration to the rights of both parties:

> "We are unwilling to promulgate a hard and fast rule. Undoubtedly in some cases Jencks Act statements should be produced and studied in the physical absence of the jury. This would be particularly true where a witness' testimony is lengthy and complicated, or is especially crucial in the context of a given trial. On the other hand, there will be many cases where it will be sufficient to produce the statements out of the hearing of the jury and to call a recess without excusing the jury from the courtroom. Thus, when defense counsel de-

> sires production of Jencks Act statements, he should be allowed to make such a request before the bench out of the hearing of the jury. If defense counsel so requests, the court can determine at that time whether it is necessary to remove the jury from the courtroom. If the statements are used in cross-examination, the jury should be informed of the source of the questions and the statutory authority governing the use of such statements. These procedures should be followed in this circuit in trials commencing after the date of publication of the opinion in this case."

In the instant case it is noteworthy that the appellant's counsel requested in the presence of the jury that the Jencks Act statement of one witness be furnished, and asked that they be given in advance because "it would save a lot of time". As indicated above the rule we adopt leaves room for discretion to be exercised by the trial judge in the circumstances as they actually develop at the trial. This discretion is not here shown to have been abused and we are not persuaded that Beaudine suffered any prejudice from the procedure followed. His conviction will not be reversed on this ground.

The judgment of the district court is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22802

RAYMOND ALFRED BEAUDINE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(November 17, 1966.)

Before BROWN, GEWIN and GOLDBERG, Circuit Judges.

BROWN, Circuit Judge: The Appellant, Beaudine, an officer of Clearwater Federal Savings and Loan Association, was convicted for taking kickbacks from a contractor performing work for borrowers under Title I, Home Improvement Loan, in violation of 18 USCA §1006. Beside the attack upon the sufficiency

of the evidence which we find unavailing once the standard of "defrauding" is fixed, his complaint is directed primarily to the undue restriction of cross examination of the contractor, an admitted ex-convict, and one who had participated in like ventures before. We conclude that standing alone none of the instances of restrictive cross examination would call for reversal. But when considered together and in the light of other restrictive evidentiary rulings, we are left with such uncertainty that we cannot pass them off as harmless error. We therefore reverse and remand for new trial.

The story may be quickly told. Beaudine shortly after coming with Clearwater[1] was promoted to Assistant Vice President and put in charge of Title I, Home Improvement Loans. Under the regulations, 24 C.F.R. §201.6f, the lending association was afforded wide latitude in relying on the application for loan executed by the prospective borrower. Beaudine, however, establishing standards for Clearwater required a credit inquiry and report from the local Credit Bureau. Occasionally the Credit Bureau report would reflect outstanding debts of the applicant, frequently small in amount but old in age, such as doctors, hospital bills, etc., which would adversely affect the current credit rating of such person. Under the arrangement with Mulvey, the contractor, Beaudine would advise Mulvey of such situations. Mulvey was to advance the funds through the Credit Bureau acting as a collecting agency to pay off such adverse

[1] Clearwater Federal Savings and Loan Association.

items. Mulvey would then "sell" the loan applicant on giving the improvement contract to his company. For this Mulvey agreed to split the contracting profits on each of such jobs on a 50/50 basis with Beaudine. In the period of three to six months there were approximately 70 such contracts which netted approximately $12,000 to $16,000 to Beaudine. All of the payments by Mulvey or his representatives to Beaudine were in cash and delivered furtively in a clandestine manner.

It rounds out this brief picture to state that the Government did not prove, nor even undertake to prove, that Clearwater suffered any loss or likely would suffer a loss from any of the Beaudine-Mulvey transactions. Indeed, to the contrary, the evidence showed that Beaudine had rejected not less than 90 credit applications presumably because of intrinsic deficiencies so these never got into the Beaudine-Mulvey profit-sharing arrangement.

The statute, an amalgam by the 1948 Code revisers of 11 or more similar acts respecting a like number of executive departments or governmental agencies, makes it an offense for an officer, agent, or employee of any savings and loan association to participate or share in or receive directly or indirectly any money, profit, property or benefits through any transaction, loan, commission, contract, or any other act of such association if done "with intent to defraud the United States or any agency thereof." 18 USCA §1006.[2] See

[2] "Whoever, being an officer, agent, or employee of or connected in any capacity with * * * any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States

United States v. Meyer, 5 Cir., 1959, 266 F.2d 747, 755, cert. denied, 361 U.S. 875, 80 S.Ct. 138, 4 L.Ed.2d 113.

If loss to the Association (or the Government) is required or for that matter the purpose to bring about a loss to the Association (or the Government), then this record is inadequate to make out an offense and the motion for a judgment of acquittal ought to have been granted. We agree, however, with the Government that the statute, awkwardly expressed as perhaps it is, is to be given no such narrow reading. Indeed, that it is a composite to cover many agencies and many activities is paralleled by the breadth of the specific actions prohibited which reveal clearly a congressional purpose to keep that part of the market place in which the Federal Government plays such a significant role free from fraud, deception, and corruption. Thus it prohibits actions by officers and employees which, "with intent to defraud," will "deceive any officer, auditor, examiner or agent," and forbids the making of "any false entry in any book, report or statement * * *" or without proper authorization the drawing of "any order or bill of exchange" or the issuance of "* * * any note, debenture, bond or other obligation * * *." 18 USCA §1006.

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* * * with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation * * * or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The statute is intended to do much more than forbid unsophisticated embezzlement, larceny or theft. And that part of the statute with which we are concerned is a typical conflict of interests prohibition. As such it is a congressional recognition of the principle so well grounded in morality and equity that the servant cannot serve two masters and that when this is done without complete disclosure, the law considers that the master-principal's interests either will, or are apt to, suffer.[3] Approached in this light, the charge given by the trial Court, adapted from Judge Mathis' Manual of Jury Instructions, seems quite in order.[4]

The fraud commences with the deceit—ostensibly acting solely for the interest of the principal while all the while the faithless servant knows he, too, has a pecuniary interest which will or might subvert his undivided loyalty. When there is the purpose to deceive, it matters not whether the objective is to obtain an advantage or to cause the principal to suffer a loss. Either in effect completed the fraudulent purpose. See also *Baiocchi v. United States*, 5 Cir.,

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[3] See Nye v. Lovelace, 5 Cir., 1956, 228 F.2d 599 at 603 and cases cited note 6. See especially Restatement of Agency §381, comment (a),(d); §387, comment (b).

[4] "You will note that the acts charged in the indictment-information are alleged to have been done with 'intent to defraud'. However the evidence need not show that the United States or anyone was actually defrauded, but only that the accused acted with the 'intent to defraud'.

"To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self." Mathis, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 90, §7.05.

1964, 333 F.2d 32, 35-36; *United States v. Corbett*, 1909, 215 U.S. 233, 244-45, 30 S.Ct. 81, 54 L.Ed. 173; *cf. United States v. Spector*, 7 Cir., 1963, 326 F.2d 345, 349; *United States v. Meyer*, 5 Cir., 1959, 266 F.2d 747, 754-55; *Gevinson v. United States*, 5 Cir., 1966, 358 F.2d 761.

Here, of course, once Mulvey's story was credited, Beaudine (a) practiced deceit and (b) stood to, and did, gain extensively. Under that standard, the evidence was therefore sufficient to sustain conviction. But the whole case, both from the standpoint of its legal sufficiency and from the probative persuasiveness for jury resolution, rested on Mulvey. He was a confessed three or four-time convicted felon. His credibility both from the standpoint of moral trustworthiness and recollection was therefore of critical, decisive importance. But at least twice, under objections made by Government counsel so frequently throughout the whole record as to almost defy the orderly development of any particular fact or thread, the trial Court severely restricted cross examination. After Mulvey had earlier testified in cross examination that he had been convicted "three or four times" for felonies, the last of which was "for fraud against the FHA" in 1960 in that very Court, Government counsel again objected to further inquiry on a ground which turns out to have been a misapprehension of the law.[5] The Court agreed.[6] Again, at the very close

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[5] Government counsel: "I object, * * *. The man [Mulvey] has stated that he has been convicted of a felony three or four times, and that is as far as we can go."

[6] The Court: "I think that is as far as * * *

"I don't think the nature of the case involved has anything to do with it * * *. So I don't think the jury should

of cross examination, counsel's efforts to find out what crimes Mulvey had been convicted of, when and where, were similarly rebuffed by Government counsel's objections sustained by the Court.[7]

We have no doubt that to cut off inquiry in this fashion was erroneous. The one attacking credibility was entitled, at least in the first instance, to establish the number of convictions, the nature of each of the crimes charged, the date and time of conviction. Refusal to allow this minimum information to be developed could not be sustained by the accepted and salutary principle which prohibits the attacker going into the details of the crimes.[8] Moreover, the subject of inquiry being relevant, the purpose of the proposed questioning was something more than merely to establish the fact that he had some prior felony

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pay any attention to that. What he is entitled to ask is the fact that the man has been convicted of a crime. We are not trying him for the crime."

[7] "Q. Now, you stated that you were convicted three or four times. You are not certain of how many times you have been convicted of a felony?

"A. No, sir. Some of them are back forty years ago when I was in my teens.

"Q. And when was the last time you were convicted?

Government Counsel: "He has been over that, Judge.

The Court: "That is not necessary. Now you have got all that you are going to get on that. Going into those offenses is not necessary and we will have no more of this. The question of how many times he has been convicted of a crime has been gone into thoroughly."

[8] "How far may the cross-examiner go in his inquiries about convictions? He may ask about the name of the crime committed, as murder or embezzlement, and the punishment awarded * * *. On the whole, however, the more reasonable practice, minimizing prejudice and distraction from the issues, is the one generally prevailing that beyond the name of the crime, the time and place of conviction, and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into." McCormick, Evidence §43, at 92-93 (1954).

convictions. Here it took the form of a classic inquiry designed to test memory which, in many, many details, was hazy at best. Added to that is the fact that the law does not limit inquiry to whether there was a "felony" conviction. The nature of the crime is a relevant fact for the reason, if no other, that it is rightfully assumed that some types of crimes have a more immediate direct bearing than others on the element of veracity.[9] Of course proof of this vital fact can hardly be made if the inquiry is cut off when the witness admits three or four felony convictions.

Beaudine complains also of restrictive cross examination into the incident of Mulvey's request of Beaudine's counsel that he be paid $500 and following the failure to do so, Mulvey's refusal to give a statement. Apparently at the time of an earlier trial of Beaudine on other charges a couple of years before, Mulvey had been transferred from the Federal Penitentiary to the Tampa City Jail to be available as a witness. About this time Mulvey along with Beaudine had been indicted on May 10, 1963 under the instant indict-

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[9] Indeed, see the Model Code of Evidence which would limit the use of felony convictions.

"Rule 106. Evidence Affecting Credibility.

"(1) [F]or the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness * * * except that extrinsic evidence shall be inadmissible * * *

"(b) of his conviction of crime not involving dishonesty or false statement * * *."

Model Code of Evidence rule 106 (1942). This is in conformity with the Uniform Rules of Evidence, Rule 21. See McCormick, Evidence §43, at 91 n.12 (1954). See generally Morgan, Basic Problems of Evidence 74 (1962).

ment for the Clearwater kickbacks. According to Mulvey, he arranged through his counsel to have an associate of Beaudine's counsel (Gonzalez) see him (Mulvey) in the jail.[10] According to Mulvey, he asked if Beaudine would pay his attorney's fees. In a few days associate counsel Gonzalez asked Mulvey where the money was to be sent. In the meantime Mulvey's counsel successfully urged a plea of double jeopardy to the present indictment after which he was returned to the Atlanta Penitentiary. Subsequently, as Mulvey puts it, "When I got out," presumably from the Penitentiary, he found "the $500 had not been paid." Making inquiry of Gonzalez, Gonzalez informed Mulvey that he was no longer associated with Beaudine's counsel and could take no action. Whereupon Mulvey went to Mr. Ragano, one of Beaudine's present counsel who disclaimed knowledge about the agreement to pay $500. At the same time Ragano asked Mulvey if he would care to make a statement and Mulvey declined.[11]

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[10] There is a strong suggestion that the May 10, 1963, indictment against Mulvey was an outgrowth of his refusal to testify against Beaudine in the earlier 1963 trial. Whether this was from loyalty to Beaudine, fear of self-incrimination, or both was not explored.

[11] In the preliminary questioning leading up to the conversation and demand, Mulvey, obviously an experienced witness, fenced with counsel and turning to the court asked if he could tell the story just "like it was." His narrative ended this way:

> "So I went to another attorney, and they got me a meeting with Mr. Ragano. [Beaudine's counsel] And Mr. Ragano says, 'I don't know nothing about the 500.' He says, 'Would you care to make a statement for me?' And I said, 'No, sir, I don't care to make no statement.' And that was the end of the conversation on the 500. And that there is the whole deal of the 500."

To counsel's question to Mulvey that "You requested 500 and it was not paid; is that right?," Government counsel again interposed an objection that "I think that is in the evidence now." As though cross examination was satisfied with the first answer, the Court responded, "That is all right. Don't spend any more time on this." And then the Judge, not allowing further inquiry, unavoidably, although obviously not intentionally, bolstered Mulvey's credibility by stating, "That is the right answer, isn't it Mr. Mulvey?" to which the witness replied, "Yes. sir." Making one more pass at the subject, counsel's inquiry within the next few moments concerning the $500 met with another objection that "This is just cumulative" and a like admonition from the Judge that "we are not going to spend much more time on it."

Obviously this incident was of vital importance in assaying the credibility of Mulvey. If, as his self-generated narration reflected, it was simply the case of his asking for $500 for counsel fees since his predicament had been brought about by his loyalty to Beaudine and an unconnected unwillingness to give a statement, it was one thing. On the other hand, if, as the incident certainly at least suggested, it was a case of Mulvey being willing to talk for a price, the price being $500, and an unwillingness to testify on refusal to pay, it was quite a different thing. Of course as every experienced trial lawyer knows, it would have been a TV courtroom drama dream to expect Mulvey to confess in so many words that it was the latter.

This could only be demonstrated to the satisfaction of the jury by an adroit, penetrating, relentless cross examination searching deeply into the motivation of this man. Of course as it is almost always the case when cross examination directed to its main objective—destruction of credibility—is unduly restricted, the record, of necessity, does not, cannot, reflect what would have been developed. But in the light of Mulvey's record, the restrictive examination into his criminal past, and at least two other incidents which we shall briefly discuss, it was essential in the truth finding function of the trial that Mulvey's motivations be explored fully and with vigor.

Two other incidents bear on this, one directly, the other at least as a matter of setting each of which was the subject of a restrictive evidentiary ruling and a proper objection by counsel although not asserted separately as error before us.

As a part of the incident described above on inquiry into Mulvey's prior felony convictions, counsel undertook to cross examine him about the conviction for fraud against the FHA in that very courtroom in 1960. The Government objected. Counsel explained that he wished to establish that this conviction was against another bank in the St. Petersburg, Florida area. The close relationship of this so-called prior conviction and the case on trial was soon established. Nevertheless, the Court in response to the Government's objection that it was "highly irrelevant and immaterial" ruled that "the nature of the case involved has nothing to do with" the one on trial.

That was, of course, on the face of things a correct ruling as a matter of legal principle. The details of the prior crime are not to be gone into. (See note 8, *supra.*) But this was not the situation. This record affirmatively reflects the close connection between the prior case, Mulvey's participation in it, the case on trial, and possible motives for Mulvey's testimony against Beaudine in it. On being indicted on May 10, 1963, along with Beaudine—presumably because he had declined to testify against Beaudine in the earlier case—Mulvey filed a plea of double jeopardy. The hearing revealed that in the prior case involving apparently similar Home Improvement Loan activities with the Florida National Bank of St. Petersburg (Docket No. 7821-T-Cr.), Judge Young at the time of sentencing on June 27, 1961, was fully informed that Mulvey had cooperated fully with the Government representatives in the investigation of the case involving Beaudine and Clearwater as to which no indictments had yet been returned but were apparently imminent. By extensive colloquy between Court and counsel, both Government and defense, Mulvey's assistance in the yet unindicted Clearwater case was brought sharply to Judge Young's attention. Indeed, there was complete agreement between Government and defense counsel that the Judge was to take this into account in sentencing him as to the Florida National Bank cases. As a result of the plea of double jeopardy, Judge Young again considered the June 27, 1961, sentencing proceeding and concluded that since Mulvey's sentence affirmatively took into account both his activities in the

Clearwater case and the assistance he had given the Government in its investigation, he had in effect been punished for those acts and the plea of double jeopardy was sustained.

If—and there is no longer any if—the trial Court concluded that the cases were so closely intertwined as to raise the bar of double jeopardy, this was no longer merely the situation of inquiring into the details or nature of a prior felony conviction. The record before the trial Court, but only sketchily before the jury, revealed several things about Mulvey. In 1961, pleading that he had turned state's evidence to help make a case against his accomplice Beaudine, he asked for and presumably received some consideration in the sentence. Next, when he was indicted following his refusal to testify against Beaudine in 1963, he sought the payment of $500 for his attorney's fees and, with or without some connection, declined to give a statement to Beaudine's counsel. Here were interacting factors bearing upon Mulvey's motivation. Was he testifying out of response to some 1961 expectation of leniency from plea of guilty and collaboration? Was he trying to "sell" his testimony for the $500 ostensibly to be paid to reimburse him for counsel fees? Was he testifying against Beaudine because either loyalty to Beaudine or self-incrimination fears led him to decline to testify in 1963 which, in turn, resulted in him being indicted again?

The upshot of it was that Mulvey was fair game for pressing vigorous cross examination in which all of

these relevant factors would be subject to penetrating scrutiny. And yet this record reveals that at the instance of the Government this sort of inquiry was nipped in the bud. Neither of the two incidents expressly complained of here would alone justify reversal. But considered together and especially in the light of the other facts revealed we are led to two conclusions. The first is that as the key witness upon which the Government's whole case rested, both legally and persuasively, Mulvey was not exposed to the truth-revealing pressures of the sort of cross examination which is really the heart of our adversary system.[12] Second, this having occurred, we have no way of ruling out the likely harmful consequences. On a matter so important as Mulvey's trustworthiness and credibility, if we are left in doubt we cannot allow the conviction to stand. *Kotteakos v. United States,* 1946, 328 U.S. 750, 765, ... S.Ct. ...., 90 L.Ed. 1557.

Another incident, although not so direct, bears on this general problem of harmfulness. The Government offered in evidence the papers concerning approximately 24 home loan transactions in which Mulvey claimed he and Beaudine had an interest. We quickly agree with the Government that, contrary to Beaudine's attack, this was perfectly proper. With a conspiracy count, the Government was not limited

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[12] Montgomery v. United States, 5 Cir., 1953, 203 F.2d 887, 890-91; District of Columbia v. Clawans, 1937, 300 U.S. 617, 630-32, ...S.Ct....., 81 L.Ed. 843; Alford v. United States, 1931, 282 U.S. 687, ...S.Ct....., 75 L.Ed. 624; United States v. Augustine, 3 Cir., 1951, 189 F.2d 587, 590-91; United States v. Fontana, 3 Cir., 1956, 231 F.2d 807, 810-12.

to either the loan transactions which formed the basis of the substantive counts or comprised the overt acts in the conspiracy count. These were properly admissible to prove the general arrangement and relationship between Mulvey and Beaudine, Beaudine's practice on behalf of Clearwater and for himself and the manner in which loans were processed. The obvious purpose was to show Beaudine's close connection, the indispensability of his approval of each of them, and the fact that he did approve these knowing that he would share in the booty. However, through an officer of Clearwater, counsel for Beaudine had approximately 90 other files identified in which Beaudine had rejected the loan applications. Subsequently counsel undertook in cross examining Mulvey to prove from Clearwater's records that 90 some applications had been "rejected." Mulvey stated that he could "tell why they were rejected" but again as a result of Government objections, the Court "sustained the objection" and admonished counsel to "go ahead with something that we can get on here" and to "Let's put an end to this 'rejected' business * * * let's not waste any more time."

In many respects this was, or at least might have been, the very heart of the case. Probably the big issue was the presence or absence of the intention to defraud. The defense theory was that Beaudine took extraordinary care for the interests of Clearwater, established procedures in excess of those demanded by federal regulations, and so successful was he that the bank never, so far as this record reveals,

suffered a dime's loss. Since this issue "of intent to defraud" was inescapably for the jury even under the broad and liberal standard which we have laid down, anything which bore upon the purpose, motivation and intention of Beaudine was certainly relevant. It is no answer to suggest, as the inarticulate objection of the Government seemed to imply, that this would be trying each of the 92 "rejections." It was no more doing that than was the Government's affirmative offer of the 24 loan files a "trial" of each of them. This bore directly upon the procedure established by Clearwater, largely through Beaudine, the performance of his own official duties and whether, on the standard we have elaborated, this was done with a deceitful purpose to bring about a loss or obtain an advantage.

We think this illustrates again that the real difficulty in the trial of this case was the Government's insistence that the case could be truncated as the Government saw fit into those transactions which it thought were pertinent. But both affirmatively and defensively, the case was not confined to the three isolated loans forming the subject of the substantive counts or the few items described as overt acts in the conspiracy count. Broad range was rightfully allowed to the Government in establishing the general scheme, pattern, procedure, motivation and practice out of which to establish the requisite intent to defraud and participation in profits. Equally so, broad range was to be afforded in the rebuttal of these offtimes elusive factors.[13]

[13] There were two mechanical problems which seemed to vex the trial of this case. The first was apparently an

Considered cumulatively, these restrictive rulings leave us with the impression that the jury did not see the whole case. Accordingly, the case must be retried.

REVERSED AND REMANDED.

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absence of any pretrial procedure, see Judicial Conference of the United States, Recommended Procedures for the Trial of Protracted Cases 47 (West 1960) and especially page 48 n. 55, now covered specifically by F.R.Crim.P. 17.1 (added February 28, 1966, effective July 1, 1966), by which the mass of documentary evidence was organized, marked, identified, etc. in advance of trial. Throughout counsel for defense stipulated to authenticity, genuineness of initials and signatures, but as this came during the trial each paper had to be separately handled, sometimes three and four times in laboriously undertaking to see whether it had, for example, a signature or initial on it, or the like. The next, and to us more serious, is the procedure, apparently a time-honored one among Florida lawyers and Judges, by which documents can be identified only on cross examination reserving to the cross examiner's own "case" the opportunity to reveal either the contents of the identified paper or offer it in evidence. Considering the valuable right of a defendant to stand on the motion for judgment of acquittal, F.R.Crim.P. 29; Jackson v. United States, 5 Cir., 1958, 250 F.2d 897, 901, and the hazard that comes to one who undertakes to put on a case after the motion is denied, it is difficult to see how evidence (documentary or oral) which is relevant is to be kept from the jury's consideration until the Government's case is all over and the defendant is forced to put on a case. Where in a civil case a similar action prejudiced substantive rights, we disapproved such practice. Delta Engineering Co. v. Scott, 5 Cir., 1963. 322 F.2d 11 at 19, on rehearing, 325 F.2d 432. As this sometimes directly involves, or is akin to, the much mooted problem of the Federal versus the Orthodox rule on the scope of cross examination, see Wigmore, Evidence §§1885-88, 1890 (3d ed. 1940), we would emphasize that our criticism assumes that the matter sought to be inquired into (by documents or orally) is related to the matters elicited on direct examination in chief (see, e.g., Wigmore, supra, §1891(2)) or, if not, that it is a matter going to credibility (*Ibid.*). Florida certainly accords much liberality in this direction. See Padgett v. State, Fla., 1912, 64 Fla. 389, 59 So. 946; Frost v. State, Fla.App., 1958, 104 So.2d 77.

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APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25019

RAYMOND ALFRED BEAUDINE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(November 25, 1969)

Before GOLDBERG, GODBOLD and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1017

RAYMOND ALFRED BEAUDINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 414 F. 2d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1969. A petition for rehearing was denied on November 25, 1969. The petition for a writ of certiorari, filed December 30, 1969, is out of time under Rule 22–2 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

377–690—70

QUESTIONS PRESENTED

1. Whether the indictment sufficiently apprised petitioner of the charge against him.

2. Whether petitioner was denied the opportunity to testify as to intent.

3. Whether impeaching material as to a government witness was improperly withheld.

4. Whether the procedure for production of Jencks Act material was fair.

STATUTE INVOLVED

18 U.S.C. 1006 provides in pertinent part:

> Whoever, being an officer, agent, or employee of or connected in any capacity with * * * any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States * * * with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

In 1963, a five-count indictment was returned in the United States District Court for the Middle District of Florida charging petitioner (an officer of Clearwater Savings and Loan Association) and one Joseph

Mulvey with federal credit fraud, 18 U.S.C. 1006, and conspiracy to defraud, 18 U.S.C. 371. Counts one and three charged that petitioner, with intent to injure and defraud Clearwater Federal Savings and Loan Association and the Federal Savings and Loan Insurance Corporation, shared in and received the benefits of association loans which he approved. Count V charged petitioner and Mulvey with conspiracy.[1] After a trial in 1963, petitioner was found guilty on all three counts. The court of appeals reversed that conviction, finding that restrictive cross-examination as well as other restrictive evidentiary rulings at the trial could not be regarded as harmless error. *Beaudine* v. *United States*, 368 F. 2d 417. On retrial, a jury acquitted petitioner as to counts I and V but found him guilty as to count III. He was sentenced to five years' imprisonment.

1. The evidence adduced at the re-trial revealed that in May, 1959, petitioner was an officer of the Clearwater Federal Savings and Loan Association, in charge of its home improvements loan department (Tr. 45). He possessed full authority to approve or disapprove home improvement loans (Tr. 48).

Mulvey, who was in the home construction business, testified that petitioner had asked him if he would like to have a partner, with petitioner to receive half the

[1] Counts II and IV charged Mulvey with aiding and abetting petitioner in the commission of the offenses charged in Counts I and III. The counts against Mulvey were dismissed at the first trial on the basis of double jeopardy, since he had previously pleaded guilty to offenses involving these transactions.

profit Mulvey made on home improvement loans acquired through petitioner (Tr. 206). This share came to between sixteen and twenty thousand dollars (Tr. 233).

2. At the conclusion of the first government witness' direct testimony, petitioner's counsel, in the presence of the jury, requested "any 3500 statements" (Tr. 59). He stated that "in the future it would save a lot of time if they would give us those statements in advance at the beginning and we wouldn't have to ask for recesses" (Tr. 59–60). The court granted a short recess then instructed the jury (Tr. 61):

> All right. The best thing to do—and we won't have this happen again because the government will produce the statements, Lady and Gentlemen of the Jury, that they have in their possession, if any there is, taken from witnesses who are going to testify on behalf of the Government, because under the law the attorney for the defendant has a right to examine those statements before he begins his cross-examination of the witness, so Mr. Raqano has a right to examine this five-page statement that this witness apparently has given to the Government before he starts on his cross-examination, but we are going to avoid that difficulty from now on out because the government is going to furnish them the statement as the witness comes to the witness stand, see, but we'll take a recess for 10 minutes * * *.

Thereafter, in a discussion outside the presence of the jury, the government agreed simply to place a copy of any statement on defense counsel's table prior

to a witness' direct testimony (Tr. 61–68).[2] The trial judge was concerned with the considerable delay that would be engendered were he to ask the jury to leave the courtroom every time a statement was produced (Tr. 65). He stated that, since he had already been required to explain the necessity for producing statements, the agreed procedure would avoid "making a mountain out of a molehill and get[ting] into matters that are collateral to the principal issues here" (Tr. 69).

ARGUMENT

1. On the appeal from petitioner's first conviction, petitioner contended that the government had not proved that he possessed an intent to defraud. The court of appeals concluded that the statute encompassed the conflict of interest situation presented here, and approved the charge given on the issue of intent (Pet. A–19).[3] The court held that fraudulent purpose existed under the statute whether the objective was

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[2] The trial judge remarked that this procedure provided an advantage to petitioner since 18 U.S.C. 3500 requires the statements to be turned over *after* the conclusion of a witness' direct testimony (Tr. 65).

[3] "You will note that the acts charged in the indictment—information are alleged to have been done with 'intent to defraud.' However, the evidence need not show that the United States or anyone else was actually defrauded, but only that the accused acted with the 'intent to defraud.'

"To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self."

In essence, this same instruction was used at the second trial (Tr. 785).

to obtain an advantage, or to cause the principal to suffer a loss. In these circumstances, there is no merit to the claim that "the Indictment failed to inform Petitioner of the accusation against him" (Pet. 16). Whatever his expectations at the first trial, petitioner clearly knew after his first appeal what would be required of the government at the second trial. Accordingly, he was afforded sufficient opportunity adequately to prepare his defense.

2. During the trial, Beaudine's counsel asked him the following question:

> Have you ever during your association with the Clearwater Federal Savings and Loan Association done any act with the intent to injure and defraud that Association?

The government lodged an objection to the form of this question, contending that it was cast in terms of legal art; the objection was sustained. As the court of appeals noted, the specific question was defective because it "was extremely broad in form" (Pet. A–6). And, while petitioner did not seek to rephrase the question, he did avail himself of the full opportunity to testify as to his intent. He stated that he had never approved any loan applications for Clearwater Federal Savings and Loan Association that he felt were harmful to the association or improper in any fashion; that he had never been in partnership with Mulvey, directly or indirectly; that he never received any kickbacks from Mulvey directly or indirectly; and that he had never offered to make an illegal or bad loan to anyone (See Tr. 576, 552, 554, 567–568, 573–574, 591–592).

3. On direct examination Mulvey testified that he had previously been convicted of four felonies—in 1934, 1936, 1948, and 1960—including breaking and entering, theft of an automobile, and defrauding the government in connection with FHA loans (Tr. 237–240). On cross-examination petitioner's counsel asked whether Mulvey had not been convicted of seven rather than four felonies (Tr. 243). Counsel requested the government to produce an FBI record to aid this line of impeachment. The court denied this motion, stating in effect that it was up to petitioner to try to prove that the witness had been convicted of the other felonies (Tr. 245). Subsequently, a subpoena duces tecum was served on a special agent of the FBI who had been present during the trial. After a hearing, the court ordered the government to produce the record for the court's inspection *in camera* (Tr. 486); it then ordered the government to turn it over to counsel for petitioner (Tr. 488). Mulvey was subsequently cross-examined by use of this record. He admitted having been convicted of serious crimes more frequently than he had admitted previously. However, as the court of appeals noted, this testimony could be construed to indicate that he had not previously lied deliberately but "may have been confused as to a distinction between a misdemeanor and a felony, concurrent sentences, and crimes committed while he was incarcerated" (Pet. A–9).

The appellate court concluded (Pet. A–9):

> The testimony in its entirety shows clearly that [petitioner] had and took advantage of a full opportunity to present to the jury the character, background and veracity of the witness Mulvey. Although [petitioner] received some of the information that enabled him to cross-examine more vigorously at a later time than he would have preferred, his cross-examination was complete before the government rested its case. This point is obviously devoid of merit.[4]

4. Counsel for petitioner did not make the initial request for Jencks Act statements by approaching the bench. Rather, he requested them in open court in the presence of the jury. The court's action thereafter was designed to and did put the matter in proper perspective for the jury. The procedure subsequently followed de-emphasized the production of statements. The court below properly found that the trial court acted within the bounds of its discretion. The situation is totally unlike that in *Gregory* v. *United States*, 369 F. 2d 185 (C.A. D.C.), where the court refused to hear the motion at the bench; the court's holding here demonstrates its compatibility with the rules of other circuits.

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[4] The United States Attorney advised the court of appeals that he did not have the FBI "rap sheet" in his possession, nor did he see it prior to the issuance of the subpoena duces tecum. He also stated that he had not deliberately and knowingly withheld the information regarding the number of prior convictions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

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